Supreme Court, U.S.
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No. 96-570

In The
Supreme Court of the United States
October Term, 1996

Arthur R. Sorkin,
S. Diane Smith,

Petitioners,

v.

County of Santa Cruz,

Respondent.

Petition for Writ of Certiorari
To The California Court of Appeal,
Sixth Appellate District

REPLY TO BRIEF IN OPPOSITION

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In Propria Persona

Respondent County of Santa Cruz's arguments presented in its Brief in Opposition are without foundation. The County's rhetoric overwhelms the realities of the case, and the County's Brief has liberally rewritten the facts of the case.

The County appears to claim that the decisions below are based on adequate state law and that there are no federal issues involved. The record below shows this to be clearly false. All issues, even when referenced by state cases, are inextricably intertwined with federal constitutional issues, providing a basis for this Court's jurisdiction, *Ohio v. Robinette*, Case No. 95-891, November 18, 1996.

I A DECISION ON DENIAL OF DUE PROCESS IS NOT ADVISORY

The County asserts that there was no taking because Petitioners were able to continue to occupy their home. This assertion in not in accord with the decisions of this Court in *U.S. v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), and *Connecticut v. Doehr*, 111 S. Ct. 2105 (1991). In particular, Good was able to occupy his home and Doehr was able to continue to occupy his home during the pendency of their cases. This did not excuse the denial of due process.

The County asserts that a decision on the question of the denial of due process involved in the County's placing a cloud on the title to Petitioners' home without notice and hearing would not affect the judgment and would be purely advisory. This is incorrect. While it would not affect the injunctive portion of the judgment, it would have an effect on the rest of the judgment. The judgment awards the County both civil penalties and costs, and those would, at least, be offset by any damages owing to Petitioners resulting from the denial of due process, as was ordered by the U.S. Court of Appeals for the Ninth Circuit (and affirmed by this Court) in *Good*.

Governmental officials need to know what the limits are to their power to interfere with real property rights in the name of "code enforcement". This is clearly an important issue of law that should be decided by this Court.

II INTERMEDIATE SCRUTINY IS REQUIRED FOR CONSTITUTIONAL CHALLENGES TO REGULATORY TAKINGS

The County's Brief in Opposition relies heavily on *Heller v.* Doe, 113 S. Ct. 2637 (1993), for the proposition that only minimal scrutiny is required in an equal protection challenge to legislation. However, *Heller* is inapposite. In *Heller*, this Court specifically declined to consider intermediate scrutiny, because it had never been raised below, *Heller* at 2642. *Heller* also does not involve a takings claim.

In contrast to *Heller*, Petitioner's Answer raised the issue of regulatory takings, and intermediate scrutiny was specifically argued by Petitioners in both the trial court and Court of Appeal. Petitioners argued, *inter alia*, that an intermediate standard of scrutiny was *required* for regulatory takings by zoning[1]. However, both the trial court and the Court of Appeal chose to apply the minimal standard of scrutiny, i.e., "rational basis." In their petition for rehearing, Petitioners pointed out explicitly that the Court of Appeal's use of "rational basis" was incorrect, but the Court of Appeal declined to grant rehearing.

The County is also incorrect when it argues that the courts never scrutinize the reasons for legislation if any rational basis can be imagined. This Court has done so in numerous cases, e.g., *Romer v. Evans*, 116 S. Ct. 1621 (1996). A suspect class is not required; under-inclusiveness and over-inclusiveness, coupled with the lack of a "good reason", made the apparent aim of the legislation suspect in *Romer*. The decision in *Romer* was not based upon treating homosexuals as a suspect class, which would have required the highest level of scrutiny. A similar situation to *Romer* applies in this case, because the County's zoning restriction is both under-inclusive and over-inclusive and lacks a "good r`ason", i.e., a real and substantial relationship to a legitimate governmental purpose.

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[1] Petitioners used the term "rational relationship" or "rationally related" to indicate higher than minimal scrutiny, as this was the term used by certain California Courts of Appeal, e.g., *Elysium Institute, Inc. v. County of Los Angeles*, 232 C.A.3d 408, 4526 (1991).

In both the trial court and the Court of Appeal, Petitioners argued that singling out dogs and cats for special regulation, among all other animals similarly situated, was not based upon any inherent difference and, therefore, violated equal protection. The County's Brief in Opposition raises the issue of animals running in packs, attacking other animals, and producing noise and excrement in support of their position. This argument is specious. Since other animals besides dogs and cats, e.g., geese and buffalo, have identical characteristics, and those animals are completely unregulated by the County's zoning ordinances and are allowed in unlimited numbers on Petitioners' property, the County's argument actually supports Petitioners' position that the special zoning restriction on dogs and cats does not bear a real and substantial relationship to a legitimate governmental purpose.

Following this Court's recent decisions in *Nollan* and *Dolan*, some California courts have begun to apply intermediate scrutiny to takings cases. The California Supreme Court, citing *Nollan v. California Costal Comm'n*, 107 S. Ct. 3141 (1987), and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), applied intermediate scrutiny to a takings claim in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996), after that case was remanded by this Court in a memorandum decision requiring *Dolan* to be considered, 114 S. Ct. 2731 (1994). In *Santa Monica Beach, LTD. v. Superior Court*, 42 Cal. App. 4th 1228 (1996), the Second District Court of Appeal suggested that a rent control law might be subject to intermediate scrutiny "as applied" because it "goes too far." A recent article even proposed that all land use regulations should be subject to the *Nollan-Dolan* analysis requiring intermediate scrutiny, *Nollan and Dolan: The End of Municipal Land Use Extortion - A California Perspective*, Jason R. Biggs, 36 Santa Clara Law Review 515, 554 (1996). In contrast, the land use analysis used below in this case was based on only the minimal level of scrutiny.

The question of level of scrutiny was properly raised below and is squarely before the Court. The lack of consistency in the decisions of the lower courts needs to be resolved by this Court.

III DUE PROCESS REQUIRES THAT CRIMINAL STANDARDS OF STATUTORY CONSTRUCTION BE APPLIED IN A CIVIL CASE WHEN THERE IS AN UNDERLYING CRIMINAL OFFENSE

The cases cited by the County in their Brief in Opposition actually support Petitioners' argument that elements of criminal due process can be required in a civil setting[2]. The County's analysis of their cases is faulty and the nature of the references is misstated. None of the County's references support the County's contention that a case in which a governmental entity seeks a permanent injunction for an alleged code violation, where the alleged code violation is also a misdemeanor, is purely civil.

While the term "rule of lenity" was not used in the trial court, the ambiguity in the Santa Cruz County Code arising from the conflict between Santa Cruz County Code §§13.10.322(b) and 13.10.643(a)(3) was raised in the trial court. It was argued by Petitioners at trial that the ambiguity should be resolved in Petitioners' favor because the Code sections in question were unconstitutionally vague.

Further, the trial court allowed Petitioners to invoke their Fifth Amendment privilege against self-incrimination when they testified at trial. This clearly shows that the trial court understood that there was a criminal offense involved in this case, even though the sanctions sought by the County were civil. However, the trial court failed to extend its application of criminal due process to its analysis of statutory construction.

On appeal, Petitioners argued, because of the underlying criminal offense, that the trial court erred in not applying criminal standards of statutory construction, including the rule of lenity and the void-for-vagueness test. To the extent it had not

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[2] The County asserts in a footnote that Petitioners have not complied with the permanent injunction as of this date. This assertion is correct. A mandatory injunction is automatically stayed under California law while appeals are pending. Petitioners fail to see the relevance of the County's assertion to the important questions of law raised in the Petition for Writ of Certiorari.

been raised in the trial court, this point was raised under the exception stated in *Hale v. Morgan*, 149 Cal. Rptr. 375 and *Fane v. Edenfield*, 945 F. 2d 1514, affirmed 113 S. Ct. 1792 (1993), allowing pure questions of law to be raised for the first time on appeal.

The Court of Appeal, reviewing statutory construction *de novo*, decided that there was no ambiguity, because it could resolve the conflicting provisions by inferring legislative intent. As a result, the Court of Appeal's decision did not directly address the rule of lenity or unconstitutional vagueness. However, the Court of Appeal should have, because the existence of conflicting provisions of the Santa Cruz County Code necessarily imply an ambiguity, requiring the rule-of-lenity to be applied, *U.S. v. Thompson/Center Arms Company*, 112 S. Ct. 2102 (1992). Similarly, the ambiguity coupled with the fact that the Court of Appeal had to resort to an analysis of inferred legislative intent to resolve the conflicting Code provisions implies that the void-for-vagueness test stated in *Grayned v. City of Rockford*, 92 S. Ct. 2294 (1972) and *Kolender v. Lawson*, 103 S. Ct. 185, should have been applied.

The nation's lower courts are in need of guidance as to the appropriate standard of statutory construction to apply in civil cases where there is an underlying criminal offense.

CONCLUSION

Petitioners respectfully submit that the Petition should be granted and a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal for the Sixth Appellate District.

Dated: November 20, 1996

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